

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 454 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MATVA HASAM SULEMAN

Versus

STATE OF GUJARAT

Appearance:

MR YS LAKHANI for appellants

MR ST MEHTA APP for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 15/07/98

C.A.V. JUDGEMENT

1. In this criminal appeal, appellants herein/ original accused Nos. 1 and 3 have brought in challenge the judgment and order dated 17.4.1995 recorded by the learned Additional Sessions Judge of Rajkot, at Gondal, in Sessions Case No. 30 of 1990, whereby the appellants were convicted of the offence punishable under Section 326 of the Indian Penal Code ('IPC' for short) and

sentenced to suffer R.I. for five years and to pay fine of Rs.500/- and in default of payment of fine, to undergo simple imprisonment for further three months.

2. The present appellants alongwith deceased Khant Anubhai Nanjibhai and acquitted offender Khant Vinu Nanjibhai faced trial for commission of alleged offence arraigned on charge of having committed assault on the complainant Balubhai Kanabhai as there was previous enmity between them on account of past money transactions.

3. A conspectus of the prosecution case can be summarised in nut-shell as under:

3.1 The complainant Balubhai Kanabhai lodged a complaint on 28.1.1990 at Jetpur Government Hospital wherein, inter alia, he stated that on that day at 9.45 P.M. he was passing from Teen Batti Chowk for going to his house situated in Police Lane. When he reached near the old power house, four persons chased him. One was Khant Anubhai Nanjibhai having axe in his hand, second was Matva Hasam Suleman having sword with him, third was Khant Pravin Nanjibhai armed with dharia and the fourth person was the brother of Pravin whose name was not known to him and he was having stick with him. All the said four persons encircled Balubhai Kanabhai and assaulted him. Anubhai gave an axe blow, Hasam Suleman gave a sword blow, Pravin gave a dharia blow and the fourth person gave a stick blow to the complainant. The assailants gave blows on the head and legs of the complainant and caused fractures. The complainant shouted for help and at that time one Vithalbai who was working in Shakti Godown and a police constable, Raghuvirsingh rushed to the spot of occurrence. On seeing them the assailants fled away from the scene of offence.

3.2 The injured complainant was removed to Jetpur Government Hospital in a lorry. The narration in the complaint was that there was previous enmity between the complainant and Hasam Suleman with respect to past money transactions and the complainant had threatened Hasam Suleman that he will give complaint against him. Therefore, all the aforesaid four persons have caused grievous hurt to the complainant in furtherance of their object with a view to take revenge.

3.3 On receipt of the aforesaid complaint offence was registered at Jetpur Police Station under Section 326, etc., of IPC and investigation was started. During the

course of investigation, statement of various witnesses were recorded. Panchnamas were prepared with the help of Panchas. Muddamal weapons used for the commission of crime were also recovered after preparing discovery and recovery panchnama with the help of panchas. During the course of investigation, offence under Section 307 of the IPC was added.

3.4 On completion of the investigation, the accused were charge-sheeted for the commission of offence as alleged, in the Court of the learned Magistrate at Gondal. As the case was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions of Rajkot at Gondal and the learned Additional Sessions Judge framed charge against the accused which was read over and explained to them to which they pleaded not guilty and claimed to be tried.

3.5 In order to substantiate the charge levelled against the accused and to prove the guilt of the accused, prosecution has examined in all 16 witnesses and placed reliance on relevant documents. Thereafter the learned trial Judge recorded statement of the accused persons under section 313 of the Criminal Procedure Code ('the Code' for short).

3.6 It may be mentioned at this stage that accused No.2 Khant Anu Nanjibhai died during the pendency of the trial and, therefore, no finding could be recorded against him.

3.7 After recording evidence of the prosecution witnesses and appreciating the same, the learned Additional Sessions Judge recorded conviction against accused Nos.1, Matva Hasam Suleman and accused No.3 Khant Pravin Nanjibhai, who are the appellants in this appeal, for the commission of the offence punishable under Section 326 of IPC and awarded the sentence as aforesaid while accused No.4, Khant Vinubhai Nanjibhai was acquitted as charge against him was not proved.

3.8 Feeling aggrieved by the aforesaid finding of conviction and sentence the original accused Nos.1 and 3 have come in appeal whereby the said judgment and order is impugned before this Court.

4. Mr. Lakhani, learned advocate for the appellants, has drawn my attention to the oral testimony of the complainant who received injuries and oral testimony of Raghuvirsingh who rushed to the spot of occurrence immediately after the incident and tried to

point out that the oral evidence of both of them is bristled with lot of contradictions. According to Mr. Lakhani, on a minute scanning of their evidence Raghuvirsingh cannot be said to be an eye witness and, therefore, no reliance can be placed on the oral testimony of both of them.

5. In view of the aforesaid submission, we may examine the oral testimony of the complainant P.W.9, Balubhai Kanabhai who was examined at Ex.19. It may be stated that during the examination-in-chief he has narrated same version as was stated in the complaint, which is on record at Ex.20. Therefore, it is not necessary to reproduce verbatim. In the examination-in-chief he has given the name of three persons i.e., Matva Hasam Suleman, Khant Anu Nanjibhai and Khant Pravin Nanjibhai and also described the fourth person as brother of accused No.3 Pravin, and unequivocally testified that they were the assailants.

6. Mr. Lakhani has drawn my attention that there are many contradictions in the cross-examination of this witness. He has stated that at the time of the incident there was darkness and, therefore, he felt that the assailants must be accused. Mr. Lakhani has further drawn my attention to paragraph 5 of the cross-examination of the complainant wherein the complainant has stated that Raghuvirsingh came after the assailants fled away while Vithalbhai came prior to arrival of Raghuvirsingh at the place of offence. By pointing out this statement of the complainant he tried to emphasis that when Raghuvirsingh came after the assailants fled away in no circumstance Raghuvirsingh can be said to be an eye witness and if Raghuvirsingh cannot be said to be an eye witness no reliance on his testimony can be placed and his statement on oath can never be accepted. Mr. Lakhani further submitted that the complainant has not given the correct position before the Court and is telling lie. Mr. Lakhani has also pointed out that many infirmities are found during the cross-examination of the complainant.

7. On careful scrutiny of cross-examination of complainant, I am not at all convinced with this submission. All the infirmities pointed out by Mr. Lakhani are very superficial in nature which cannot be given any countenance. Even the contention as to whether Raghuvirsingh was an eye witness or not also cannot be sustained in view of the evidence of Raghuvirsingh.

8. Now let us examine the evidence of Raghuvirsingh

P.W.9, which was recorded at Ex.21. He has deposed before the Court similar version as stated by him before the police while recording his statement under section 162 of the Code. On overall appreciation of the evidence of witness Raghuvirsingh it can be divulged that at the time of incident he was by 50 to 60 ft. away and on seeing the incident he raised shouts "catch, catch". At that time, the assailants ran away towards Teen Batti chowk. His statement was recorded immediately after the incident at 1 A.M. on the same night. In view of the aforesaid evidence, the contention that this witness was not an eye witness cannot be accepted. He saw the incident about 50 ft. away and his statement was recorded immediately after the occurrence. Moreover, he being a policeman his presence was natural at the place of the occurrence. Then the question arises as to what would be the effect of the statement of the complainant that Raghuvirsingh came to the spot of occurrence after the assailants fled away. It is but natural that after receiving various injuries the complainant must have fallen unconscious and therefore he could not have noticed Raghuvirsingh standing about 50 to 60 ft. away seeing the incident.

9. In view of this statement of Raghuvirsingh, the contention advanced by Mr. Lakhani learned advocate for the appellants that the evidence of both the witnesses, i.e., the complainant and Raghuvirsingh, is bristled with contradictions, cannot be accepted. On the contrary evidence of both of them is in consonance with each other and gets corroboration from each other. The first contention raised by the learned advocate for the appellants, therefore, fails and is rejected.

10. The second contention raised by Mr. Lakhani is that no panch witness has supported prosecution case. It is true that panch witnesses have not supported prosecution case. But it is a cardinal principle of criminal jurisprudence that when the evidence of prosecution witnesses inspire confidence, trustworthy and genuine, it does not require corroboration from any other witness like panch witness. Here the complainant himself was injured. According to the complainant, the cause of assault on him was the dispute with accused No.1, Matva Hasam Suleman in respect of previous money transaction. There is no question of false identification. Moreover, the previous enmity is also proved. In view of this, there was reason for the accused to take revenge on the complainant and, therefore, they have committed the assault on the complainant. In these circumstances, mere non-supporting of the panch witnesses would not come in

the way of the prosecution case and cannot be called fatal to the prosecution case.

11. Lastly Mr. Lakhani has assailed the recording of conviction for the offence punishable under section 326 of IPC. According to him, on having perusal of the medical evidence, recording the conviction under Section 326 of the IPC cannot be sustained.

12. Now let us examine the said contention. On having scrutiny of the oral evidence of P.W.16, Dr. Bharat Trivedi, whose evidence was recorded at Ex.45, it is clear that the complainant was examined by him in hospital. He has, inter alia, testified that he examined Balubhai Kanabhai on 28.1.1990 when he was on duty at Rajkot Government Hospital. He further stated that the injured complainant was referred by Medical Officer, Jetpur, to Rajkot Government Hospital. On examination, this witness found following external injuries on the body of Balubhai Kanabhai:

- (1) Sicfes injury 6" length on lt. forehead to proto parental.
- (2) Ecchymosis over obliques left eye.
- (3) Incised wound 1 1/2' x 1 1/2' M.D. vertical on rt. dibbled region.
- (4) C.L.W. 1" x 1/4 bone deep on lt. first finger vertical & slakey fracture of metacarpal phallic.
- (5) C.L.W. 1" x 1/2" muscle deep on rt. hand on bone of forefinger fracture of metacarpal pharance joint.
- (6) C.L.W. 1/2" x 1/2" muscle deep on middle left leg fracture of tibia-fibula.
- (7) C.L.W. 1/2" x 1/2" muscle deep below left knee. Bledg.
- (8) Fracture of hand humerus middle shaft.
- (9) Incised wound 1/2" x 1/2" muscle deep right leg knee 1/3rd.
- (10) Three abrasions with contusion 1/2" x 1/2" on right shin fracture of tibia-fibula at middle.

13. In cross-examination he has unequivocally testified that injury Nos.3 and 9 which are referred to hereinabove were caused by sharp cutting instrument. He further stated that injuries at Sr. Nos., 2, 4, 5, 6, 7, 8 and 10 were caused by hard and blunt substance. Certificate issued by him is also produced at Ex.45.

14. In view of the aforesaid evidence, it cannot be gainsaid that only the injuries Nos.3 and 9 were caused by sharp cutting instrument while rest of the injuries

were caused by hard and blunt substance. Now the next point to be considered is as to whether injuries No.3 and 9 can be said to be grievous injury or not. In this connection, on having further perusal of the evidence of the medical officer, it is clear that he has admitted during cross-examination that injuries No.3 and 9 were neither serious nor fracture. In view of the clear-cut admission of the doctor it would not detain me even for a moment to hold that the victim had not received any grievous injury by sharp cutting instrument. Therefore, the offence committed by the accused cannot fall within the purview of section 326 of the IPC.

15. So far as injuries No.2, 4, 5, 6, 7, 8 and 10 are concerned, they are caused by hard and blunt substance. The injuries Nos.4, 5, 6 and 8 are fractures. But they were caused with hard and blunt substance. Therefore, for inflicting those injuries, which are grievous hurt, the offence falls within the purview of Section 325 of the IPC and for causing injuries No.3 and 9, the offence falls within the purview of Section 324 of IPC. Therefore, the accused have committed offence under Sections 324 and 325 of IPC and not under section 326 of IPC.

16. The maximum sentence prescribed for offence under Section 324 is imprisonment of either description for a term which may extend to three years and the maximum sentence for the offence under section 325 is imprisonment of either description for a term which may extend to 7 years.

17. In view of the aforesaid evidence and more particularly the evidence of the medical officer, the conviction recorded by the learned trial Judge for the offence punishable under Section 326 of the IPC cannot be sustained and in the facts and circumstances narrated hereinabove it is required to be altered into one punishable under Sections 324 and 325 of the Indian Penal Code. Resultantly, it is held that the accused Nos. 1 and 3/ the appellants herein assaulted the victim and thereby committed offence punishable under Sections 324 and 325 of the IPC and, accordingly, they are held liable to be convicted for the same.

18. This takes me to the quantum of punishment to be awarded to the appellant. Learned advocate Mr. Lakhani for the appellants submitted that the appellants are entitled to get the benefit under Section 4 of the Probation of Offenders Act and, therefore, they may be dealt with accordingly and for doing the same, report of

the Probation Officer under the provisions of Probation of Offenders Act may be called for. Alternatively he submitted that if this Court is not inclined to accord the benefit under the Probation of Offenders Act then lenient view may be taken by awarding them a lesser punishment.

19. After giving anxious considerate thought to the submissions canvassed by the learned advocate Mr. Lakhani for the appellants and in view of the fact that the incident has occurred because of previous enmity and both the appellants had given various blows with hard and blunt substance which has resulted into fracture injuries, by exercising discretionary powers, I am not inclined to accord benefit under the provisions of Probation of Offenders Act to the appellants. Therefore, the request of Mr. Lakhani to afford benefit under the provisions of Probation of Offenders Act is rejected.

20. So far as quantum of sentence to be awarded to both the appellants is concerned, according to me, ends of justice would meet if both the appellants are sentenced to suffer R.I. for six months and to pay a fine of Rs.500 and in default of payment of fine, to undergo S.I. for one month for the offence punishable under Section 324 of IPC and similarly, to suffer R.I. for one year and to pay a fine of Rs.1000 and in default of payment of fine, to undergo S.I. for two months for the offence punishable under Section 325 of IPC.

21. In the premise, the appeal is partly allowed. The order of conviction recorded by the learned trial Judge for the offence punishable under Section 326 of IPC is altered and the appellants herein/ accused Nos.1 and 3 are convicted for the offences punishable under Sections 324 and 325 of IPC. The appellants herein are ordered to suffer R.I. for six months and to pay a fine of Rs.500 and in default of payment of fine, to suffer S.I. for further period of one month for the offence punishable under Section 324 of IPC. Similarly, for the offence punishable under Section 325 of IPC, both the appellants herein are ordered to suffer R.I. for one year and to pay a fine of Rs.1000 and in default of payment of fine, to undergo S.I. for further period of two months. The sentence undergone during the pendency of trial as well as appeal be given set off. Both the sentences shall run concurrently.

22. Having regard to the facts and circumstances of the case, the appellants are ordered to surrender on or before 31.8.1998 failing which the learned trial Judge is

directed to issue non-bailable warrant against both the appellants to serve out the sentence imposed on them.
